

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	Docket#	
UNITED STATES OF AMERICA,	:	10-cr-00594-ERK
	:	
- versus -	:	U.S. Courthouse
	:	Brooklyn, New York
JOSEPH YANNAI,	:	
Defendant	:	September 23, 2013
-----X		

TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING
BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES SENIOR DISTRICT JUDGE

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1 THE CLERK: United States v. Joseph Yannai.

2 Your appearances, counsel.

3 MR. SPECTOR: Good afternoon, your Honor.
4 Daniel Spector, Audrey Stone and Hilary Jager for the
5 government.

6 MR. CHECKMAN: Good afternoon, your Honor.
7 Neil Checkman and Georgia Hinde for Mr. Yannai.

8 THE CLERK: On for sentencing, Judge.

9 THE COURT: There are a couple of preliminary
10 issues that I have to deal with before sentencing that
11 deals with the issues related to the continuation of the
12 trial on June 1st after the defendant was hospitalized
13 for taking an overdose of drugs. I believe the drug
14 involved, according to the expert that both parties
15 agreed upon was Temazepam which is a much stronger drug;
16 I think Dr. Milton said six times as strong as Valium.

17 So, I have -- I first want to deal with the
18 issue of the burden of proof. I've discussed this before
19 in various places in the transcript and I assume you
20 would be able to find it without my having to -- you know
21 I've written it down where I've discussed it at various
22 places. The burden of proof in my view is on the
23 defendant. That is once it's clear that he knew that he
24 was supposed to be in court on the morning of June 1st
25 and he failed to appear; the burden was on him to explain

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1 why and to come up with an explanation that would excuse
2 his absence.

3 I want to begin first with the decision of the
4 Supreme Court that I've previously alluded to in Medina
5 v. California. That was a case as you recall that
6 involved the issue of the competence of a defendant to
7 stand trial. Medina v. California appears at 505 US 477
8 and the issue in that case in California places the
9 burden on the defendant to show that he was not competent
10 and the Supreme Court held that the due process clause
11 did not compel a burden shift to the government. That
12 consistent with the due process clause, the defendant
13 could be placed in the position of showing that he was
14 not competent to stand trial.

15 I think that case is particularly analogous
16 here because a defendant who is not competent to stand
17 trial is not competent -- is unable -- is one who is
18 unable to understand the nature of the proceedings and to
19 participate in the defense of the case. In other words,
20 he could be physically present but he's essentially an
21 absent defendant.

22 And indeed, the Supreme Court said in Medina
23 that where that's the case where the defendant is unable
24 to comprehend the nature of the proceedings or to
25 participate in his defense, then you can't go forward

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1 with the trial. And that's, of course, equally true
2 where the defendant voluntarily absents himself from the
3 trial.

4 So I think that the Medina case is particularly
5 compelling in the context of this case and it is really
6 closely analogous because in both instances we're dealing
7 with essentially a claim by a defendant that he was not
8 permitted to understand what was going on in the
9 courtroom and to participate in his defense.

10 The case that you rely on in your brief, I
11 don't think you've discussed in the papers that you
12 buried me with, Medina v. California but it's possible
13 that I missed it. You did? A little bit -- the case
14 that you cite -- let me see if I -- in your brief, United
15 States v. Salem, which is at 690 F.3d 115 for the
16 proposition that the government bears the burden of
17 proof, I don't believe is sufficiently strong enough to
18 overcome Medina for several reasons.

19 First, the issue was never -- if you take a
20 look at the briefs, the issue of who had the burden of
21 proof was never even argued.

22 Second, nothing turned on who had the burden of
23 proof. That is, in a strict technical sense, the burden
24 of proof becomes relevant where the evidence is in
25 equipoise. That is, as we all know, when we charge a

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1 jury in a civil case, if it's fifty-fifty, the party that
2 bears the burden of proof loses.

3 In the Salem case, the Court of Appeals didn't
4 discuss the issue of the evidence being in equipoise.
5 The holding didn't turn on a finding that the Court --
6 that the evidence was in equipoise and therefore, the
7 government loses. In fact, the government won the case
8 on plain error grounds.

9 So, that's one reason why I think that at best,
10 the language in -- that you cite in that case is dictum
11 since it did not affect the outcome of the case as the
12 Court decided the case and as I said, it still leaves us
13 with the Medina case which I think is compelling. And I
14 think the language in that case was more talking about
15 burden of proof and the way the Court said the government
16 didn't meet its burden of proof was in a more generalized
17 way than the technical sense that the term is used in.

18 So I don't think that the language in that case
19 is compelling -- I think it's dictum; a case that it
20 cited for the proposition that the government bore the
21 burden of proof, United States v. Lynch says the
22 government bears the burden of proving by a preponderance
23 of the evidence that the defendant waive his
24 constitutional rights, didn't involve a case of the
25 defendant being absent from the courtroom or didn't

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1 involve the presence of a defendant in the courtroom.

2 Instead, I believe that it involved a Miranda issue.

3 (Pause)

4 THE COURT: And it wasn't a Miranda issue, it
5 was -- yes, it involved a Miranda issue. If you read
6 Medina, Medina distinguished those cases from the
7 situation before the Court in Medina. And I am not even
8 sure that it's entirely true as a general proposition or
9 as a -- that the government bears the burden of
10 demonstrating by a preponderance of the evidence the
11 defendant waived his constitutional rights in every case.
12 It's that statement is somewhat inconsistent with the
13 doctrine of procedural forfeiture.

14 For example, a defendant has a right -- the
15 constitutional right to have -- to be indicted by the
16 grand jury and one that's not selected on the basis of
17 purposeful discrimination. And I believe the Supreme
18 Court has said that the failure to raise that right
19 before trial wins even though there's no knowing and
20 voluntary waiver.

21 So, the whole doctrinal procedure of forfeiture
22 involves a waiver of constitutional rights without it be
23 knowingly and voluntarily made.

24 And finally, there is a basis which I think I
25 have already cited to you which basically says that once

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1 it is shown that the defendant knew he was supposed to be
2 present in the courtroom at a particular date and time,
3 that he -- that is, the defendant bears the burden of
4 justifying his absence from a known proceeding against
5 him. And that's United States v. Ryder, 897 F.2d 639 at
6 page 643, United States v. Sanchez, 790 F.2d 245, 249,
7 where the Court said the defendant bears the burden of
8 justifying his absence from a known proceeding against
9 him.

10 So there's so much precedent as opposed to
11 policy. There are also good policy arguments for that
12 result and I've gone through them with you as well.
13 First, of course, with the general rule of evidence and
14 it's reflected in the Supreme Court's decision that I
15 already cited to you that where a defendant -- where a
16 party has knowledge that is peculiar to him, that it's
17 only right and just that that party bear the burden of
18 proof.

19 And I think that - I know your argument that
20 you make was that well it's inconsistent with what
21 normally happens in criminal cases. It actually really
22 isn't. Of course in a criminal case, the government
23 bears the burden of proving the defendant guilty beyond a
24 reasonable doubt regardless of who has actual knowledge
25 of, for example, a defendant's state of mind. But that

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1 deals with the issue of guilt or innocent; whether we're
2 going to put somebody away to jail and, you know, for how
3 long. We're not dealing with that issue in this case.
4 We're dealing with an issue of a defendant's state of
5 mind in taking what I believe is evidence that clearly
6 establishes as overdoses of medications contrary to the
7 prescription on whatever bottles he had and you have
8 testimony -- you, indicating that.

9 (Pause)

10 MS. HINDE: Thank you, Judge.

11 THE COURT: That the most critical question
12 here, at least according to Dr. Milman's testimony was
13 what did he take and when did he take it. In fact, I
14 believe you asked him at the hearing -- at page 39 of the
15 hearing on July 12th -- July 11th -- you said -- you
16 asked Dr. Milman's:

17 "Question: You read the declaration" referring
18 to the defendants -- I assume referring to the
19 defendant's affidavit -- "Based upon that, would there
20 have been any additional questions that you would have
21 had, Mr. Yannai, that you would have liked to ask
22 Mr. Yannai in terms of making a determination?"

23 And skipping down, Dr. -- to line 22, Dr.
24 Milman said:

25 "Answer: I do have some questions I would have

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1 asked. "

2 "Question: And what kind of questions would
3 you have liked to have asked, Dr. Milman of Mr. Yannai?

4 "Answer: Well, one question is in terms of
5 exactly what he took, if he can describe the drug, you
6 know, that he took and I can be more specific. I'm
7 purposely not being specific because I don't know if
8 you're going to go that way with him."

9 So we're dealing with what the doctor described
10 as an important question that he essentially did not have
11 the answer to. And later on on page 72 -- I'm sorry, on
12 page 56 the question on cross from Ms. Stone is:

13 "Question: Isn't the only way to really
14 resolve what he took is to ask Mr. Yannai exactly what he
15 took and describe it?

16 "Answer: Well, that would help, assuming you
17 believe what he tells you." Of course that's a separate
18 issue in this case.

19 And then at page 72, Dr. Milman -- the question
20 was asked:

21 "Question: Now you also have concluded to what
22 I believe you say is a degree of scientific certainty
23 that even if he took ten pills, that that was an
24 accidental overdose.

25 "Answer: No, I didn't say that. And I think I

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1 mentioned this earlier, my confidence is good on the low
2 end that if he took four pills, it was accidental but the
3 larger the number, the less confidence I have that it was
4 accidental."

5 And his own testimony, Dr. Milman's testimony
6 was based on his belief it was four to ten pills. And
7 this is an expert who you both agreed upon and whose
8 testimony was lacking in some respects but I think it was
9 useful in other respects in terms of what common sense
10 would even suggest.

11 So what we have here is essentially a record
12 that's incomplete. It's incomplete because the defendant
13 knows the answers to critical questions and he has not
14 provided it. I know you're looking at me quizzically.
15 You're telling me he gave you an affidavit.

16 MS. HINDE: I did.

17 THE COURT: Well I can't judge the credibility
18 of an affidavit but Dr. Milman didn't believe it. In the
19 affidavit, I believe Mr. Yannai said he took Valium.
20 Dr. Milman didn't believe that he took Valium, nor do I
21 for that matter.

22 Indeed, Dr. Milman said he took Temazepam and
23 as we -- in the course of the hearing, when we went back
24 over the medical notes of his first attempt at -- first
25 overdose which is conceded was a suicide attempt, the

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1 medical note which Ms. Stone read into the record at page
2 82, it begins at line 16. I'm not going to read the
3 whole thing. It says:

4 "Ms. Stone: He became -- the defendant when he
5 returned from the bathroom" -- this is when he was
6 arrested -- " he appears sluggish and was taken -- he
7 appears sedated and sluggish and was taken to the
8 Emergency Department. He became increasingly
9 unresponsive and required intubation. Patient apparently
10 took an unknown amount of Valium and possible Temazepam."

11 And the defendant himself, the first time
12 around, I believe when he testified at the bail hearing
13 said he didn't take Valium. He said he took sleeping
14 pills I think in testimony that is quoted in -- I believe
15 in one of the government's papers that is in the
16 transcript. He clearly understood the difference and
17 made it clear that he wasn't -- that he had not taken
18 Valium; that he had taken sleeping pills, which is
19 consistent with the Temazepam.

20 So that what we have here are -- this goes back
21 to my basic policy reason of why it is that the defendant
22 should bear the burden of proof. Indeed, it's bizarre
23 that we are -- the parties have retained experts to deal
24 with something that it may not be possible to establish
25 by expert toxicology testimony at all. And I don't -- in

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1 fact, I think it's beyond the expertise of a toxicologist
2 generally to say whether it was an overdose, whether it
3 was a suicide attempt or whether it was an accident, just
4 simply on the basis of the amount of drug in the system.

5 I think we do know from the affidavit and you
6 could correct me that he was popping pills the whole
7 night before he showed up -- before this happened and he
8 claimed he felt great in the morning. He felt well
9 enough to drive allegedly, unlike the preceding day when
10 he claims he took a car service.

11 So that's number -- another consideration of
12 policy, of course, I think I've alluded it again is that
13 -- I've alluded to it before that really related is the
14 fact that we're not dealing here with the guilt or
15 innocence of a defendant. We're basically dealing with
16 an important legal issue but it's an issue of him not
17 being present at a point in the trial, which as I have
18 already said on a number of occasions was one in which he
19 had nothing to contribute. I know you're very good at
20 hypothesis -- give me -- speculative -- I am going to be
21 kind -- arguments as to why he could have made some great
22 contribution to -- during the course of the reading of
23 the charge. He, of course, being present when the charge
24 -- when we went over the charge, having had presumably if
25 he were interested, an opportunity to read the draft.

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1 There were notes involving legal issues and the jury did
2 not even come into the courtroom. They were answered
3 without his presence and these were entirely legal
4 arguments that he had nothing to contribute to.

5 The jury came into the courtroom once during
6 -- before the verdict. That was pursuant to what I would
7 regard as an extraordinary request that I think may have
8 only been the first or possibly the second time since I
9 have been using ESR since 1995 and have had to take
10 advantage of the option that I give them and my
11 instructions, which is you have the charges sent into --
12 you could have the transcript sent into or you could hear
13 the testimony as it was actually given because we record
14 it all and they actually asked to hear it which, just as
15 an aside is significant to another issue and that is the
16 extent of the care with which the jury gave in its
17 deliberations. And then finally, there was the verdict.

18 I'm not saying that the defendant shouldn't be
19 present at any of these proceedings but the question
20 really is here assuming I made a mistake, whether it was
21 harmless or not and I don't think his presence -- he, of
22 course, heard the verdict on the phone but I don't think
23 -- and that normally wouldn't be enough. I think the
24 case -- the Salem case involved the issue of video
25 conferencing on the sentencing wouldn't be enough but it

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1 more than nothing in terms of the harmlessness of the
2 error.

3 I think in one of your papers, Ms. Hinde
4 suggests that maybe if the jury would have seen him
5 somehow would have caused them to change their verdict.
6 You know, just the fact that looking at a defendant --
7 that may be one of the reasons among others that we want
8 the defendant to be present but I don't believe that it
9 would have caused them to change the verdict. In fact, I
10 never heard of such a case, at least -- I mean I've heard
11 of one case in which when the jury was polled one juror
12 said it wasn't the verdict. But I don't believe it's
13 because they looked at the defendant but that's one case
14 and I have been in this court twenty-eight years as a
15 judge and ten years in the United States Attorney's
16 Office. So that's thirty-eight years and I can't think
17 of one case where that happened and it certainly wouldn't
18 have been this case where I think the evidence was
19 essentially overwhelming.

20 So those are the reasons of -- and the other
21 half of that, of course, is balanced against that is the
22 fact that if I were to grant a new trial, I would have to
23 bring these poor women back to go through the burden and
24 trauma of having to testify again over what I believe is
25 essentially harmless error and one that if I were to

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1 resolve the case or if I ever -- it would mean
2 essentially placing -- essentially totally relieving your
3 client of any obligation to assist in the determination
4 of the issue of whether his absence in the courtroom was
5 voluntary. So, unless the issue of course is assuming I
6 made an error, is whether it was harmless or not. I
7 believe it was.

8 I should add by the way that I did say -- in
9 regard to what I said before when we were doing this, I
10 believe I did say that if this case had been in a
11 different stage of the proceeding, if it were -- if we
12 were taking evidence, I might not have made the decision
13 to go forward but we were not in the evidence stage. We
14 were at a stage where I thought the defendant's presence
15 would have added nothing. The jury had already come in
16 that day. That is the morning which he had passed out at
17 a gasoline station. I sent them home. There was no
18 guarantee that he would be available a second -- the next
19 day. In fact, he wasn't.

20 As I understand it, it wasn't until the
21 afternoon of June 3rd that he regained a degree of
22 consciousness that was -- that enabled one of the doctors
23 to speak with him and he wasn't discharged from the
24 hospital for seven days thereafter.

25 And I also had a record before me -- I mean I

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1 didn't just lead to this decision. I actually held a
2 hearing and spoke to doctors on the telephone and at the
3 very least established that he took an overdose of pills
4 for the second time in the course of this criminal
5 proceeding.

6 Now the harmless error part I've already
7 addressed and I believe that it was harmless beyond a
8 reasonable doubt and the Second Circuit has held in the
9 United States v. DeMott, 513 F.2d 55 58, which is
10 actually cited in the Salem case, that "An error
11 regarding the right to be present is harmless where the
12 defendant's presence would not have affected the
13 outcome." And in addition to all of the other factors
14 that I have alluded to in terms of not effecting the
15 outcome, I believe the evidence in the case was
16 overwhelming.

17 I know he has said -- Mr. Schneider said -- I
18 believe it was Mr. Schneider, his lawyer, said that or he
19 said, the defendant said, I don't remember which -- Mr.
20 Schneider quoting him or the defendant saying it, that he
21 was very optimistic about the outcome of the case. You
22 know, defendants may be generally optimistic but
23 realistically, there was no cause for optimism and I
24 would be surprised if Mr. Schneider totally agreed with
25 him. The record doesn't indicate what Mr. Schneider said

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1 in response.

2 So we have an overwhelming case; a case that
3 could not in my judgment be won without the defendant
4 taking the stand. The defendant does not take the stand.
5 There are very sympathetic witnesses who I believe were
6 truthful, sympathetic. Much of the testimony in terms of
7 how they were induced to come to the United States and to
8 this comparatively rural part of a New York suburb, is
9 all corroborated.

10 So the evidence is overwhelming. It's
11 inconceivable to me beyond any standard -- by any
12 standard that this result would have been difference had
13 he been present. So, that leaves us with the question of
14 I believe he had the burden of proof. I think I said at
15 an earlier proceeding when Dr. Milman testified that I
16 think in the best case scenario, you could argue that
17 from the defendant's stand point is that the evidence is
18 at equipoise. And I believe if that's true, he loses
19 because I don't believe that the balance is because he
20 bears the burden of proof. And the party who bears the
21 burden of proof where the evidence is equipoise loses.

22 You're giving me these looks, I don't --

23 MS. HINDE: No, I --

24 THE COURT: -- I don't know what they mean and
25 I don't know what you --

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1 MS. HINDE: I have (indiscernible) this
2 question.

3 THE COURT: I don't know whether you don't
4 understand what I am saying or whether you disagree with
5 me.

6 MS. HINDE: Can I ask a question, Judge?

7 THE COURT: Sure.

8 MS. HINDE: Just a few -- I mean, I've had a
9 few and I've been bottling them up here. The first one
10 is, is it the Court's finding that the evidence is in
11 equipoise? I mean, I just -- you've said that a few
12 times and I am assuming you're saying that because
13 otherwise burden of proof doesn't make any difference
14 according to dicta.

15 THE COURT: Well it makes a difference in terms
16 of an appellate record. I could leave it at that or I
17 could make a finding.

18 MS. HINDE: Well, I would just -- yes, I would
19 like --

20 THE COURT: I mean I think that he took it
21 deliberately.

22 MS. HINDE: No, I am sorry, your Honor. My
23 question is --

24 THE COURT: He took it deliberately -- you
25 know, I don't find it in equipoise. I find that it's

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1 more likely than not that he took it deliberately.

2 MS. HINDE: All right. Okay. So no equipoise.

3 THE COURT: Okay.

4 MS. HINDE: Your Honor, I don't mean to just be
5 giving looks --

6 THE COURT: No, that's all right.

7 MS. HINDE: -- but I was really trying to
8 just --

9 THE COURT: No, no, I have so much --

10 MS. HINDE: -- I was trying to hold back.

11 THE COURT: I have so much respect for you that
12 when I state --

13 MS. HINDE: Likewise and I don't want to --

14 THE COURT: -- a principle of law, you make a
15 face at me, I think my God, have I misstated something?
16 If it were Mr. Spector, maybe you know -- he's right
17 occasionally but --

18 MS. HINDE: Too many times, Judge.

19 Your Honor, procedural forfeiture wise, policy
20 grounds.

21 THE COURT: No, I was just --

22 MS. HINDE: What the -- no, I understand.

23 THE COURT: -- I was just alluding to the --

24 MS. HINDE: I'm just saying that I think that
25 the --

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1 THE COURT: -- there were a number of reasons
2 why I felt that the one liner in Salem is not dispositive
3 for the issue of who bore the burden of proof. It was
4 not argued in the case by the parties. The Court didn't
5 say it -- normally when you talk about burden of proof,
6 it's to resolve an issue where the evidence is in
7 equipoise. Otherwise, you don't need any discussion of
8 the burden of proof.

9 MS. HINDE: Exactly.

10 THE COURT: Right. And the Court didn't
11 discuss -- didn't say the evidence is in equipoise and
12 because the government bears the burden of proof, the
13 government loses.

14 And finally, I mean this -- you're talking
15 about what precedential weight I should accord to this.
16 The case it cites for the proposition that the government
17 bears the burden of proof in demonstrating by a
18 preponderance of the evidence that the defendant waived
19 its constitutional rights is in fact a Miranda case, not
20 a case --

21 MS. HINDE: Well, right. Yes, your Honor and
22 that's an important --

23 THE COURT: -- not a case involving absence
24 from the courtroom and if you read Stone v. California,
25 Justice Kennedy distinguishes those cases and says they

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1 don't require a result contrary to the holding in Stone.

2 MS. HINDE: But, your Honor, a Miranda issue
3 and the waiver of constitutional rights has the same
4 underlying significance in the guilt or innocence phase
5 as does a defendant's absence which is equally
6 fundamental.

7 THE COURT: I know.

8 MS. HINDE: I mean it's the point --

9 THE COURT: I don't want to argue it.

10 MS. HINDE: Okay.

11 THE COURT: I'm just telling you my reasons.
12 You could argue it to the Court of Appeals.

13 MS. HINDE: That's why I was putting a cork in
14 it, Judge.

15 THE COURT: I think that the dispositive case
16 is the Medina case which wasn't cited.

17 MS. HINDE: Yes, I don't want to --

18 THE COURT: And the Medina case is really right
19 on point for the reasons I said. It basically deals with
20 who has the burden of proof in the context of a defendant
21 not being able to be present in the court in a meaningful
22 way.

23 MS. HINDE: Understood, your Honor, and I
24 respectfully disagree.

25 THE COURT: Well, okay. I don't lightly

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1 disregard Second Circuit cases that I think require me to
2 hold in a particular way but I think that this does not
3 require me to hold in a particular way if only because it
4 was dictum and unnecessary to the outcome of the case.
5 But also true for all the other reasons that I gave.

6 MS. HINDE: Understood, your Honor. Your
7 Honor, may I just ask for one small other additional part
8 of this new trial motion and that was the Tortora issues
9 that I don't think we've ever really addressed and I
10 understand that once you get to harmless error, that I
11 suppose that would fall through that trap door, as well.

12 THE COURT: There's one other thing I didn't
13 address. Hold -- write down Tortora before I -- there's
14 one other point that I wanted to address. There's this
15 issue that you've been desperately trying to connect to
16 the absence to the courtroom which I think sort of
17 reflects an understanding on your part of the otherwise
18 harmless nature of the error but you don't have to -- I
19 say you -- I consider you're denying it right now and
20 that's your effort to link it to the fact that it turned
21 out that two or three of the jurors had indicated that
22 they had heard that the defendant attempted to commit
23 suicide. And I have indicated that that's a separate
24 issue from the issue of his not being permitted to be
25 present in the court.

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1 First, if my recollection is correct, the
2 information about the fact that he may have attempted to
3 commit suicide came out on June 1st which was the morning
4 when he didn't show up. No?

5 MS. HINDE: Your Honor, I think the jurors
6 delivered notes at the end of the second day.

7 THE COURT: No, no, that's when they said they
8 heard it.

9 MS. HINDE: That's what I meant.

10 THE COURT: No, no, the way it works here,
11 certain things come out in the courtroom on day one.
12 They get reported in the newspaper on day two.

13 MS. HINDE: Oh.

14 THE COURT: And that's when the jury starts to
15 hear about it.

16 MS. HINDE: All right. I misunderstood.

17 THE COURT: It may have even come out before I
18 actually said I was going forward. So what I tried to
19 say on any number of occasions is that it's -- that's why
20 a separate and discrete issue from whether or not I
21 should have gone forward in his absence. That is, even
22 if I had stopped the trial, the jurors would have still
23 heard and known about the fact that there was an
24 attempted suicide or that --

25 Second, I questioned the jurors and they each

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1 indicated --

2 MR. CHECKMAN: Sorry, your Honor.

3 THE COURT: Would you send my colleagues an
4 e-mail saying your cell phone went off in the courtroom,
5 all of whom assured us that it would never happen. We
6 let lawyers bring cell phones into the courtroom.

7 MR. CHECKMAN: I think this call was from the
8 government, your Honor.

9 THE COURT: I questioned the jurors. They each
10 indicated that this would not in any way affect their
11 verdict in substance. I was not asked by the defendant's
12 lawyer to ask any more questions.

13 Now the complaint is that I didn't instruct the
14 jury that he actually didn't intend to commit suicide.
15 Of course, there was no such request for me to give such
16 an instruction and quite frankly, I just don't credit the
17 explanation that you quote on page 32 of your -- I guess
18 I can't read my handwriting now -- one of your briefs of
19 Mr. Schneider saying that well he couldn't have asked for
20 such a thing until he knew that the defendant commit
21 suicide, which is simply not true. And of course if you
22 believe him, he also thought the defendant was just in a
23 jolly mood when he left the courthouse the night before
24 or optimistic about being acquitted.

25 So, that's my basic view. That's a separate

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1 and discrete issue. I believe it's harmless for many of
2 the same reasons I've just gave and I don't want to
3 repeat them.

4 So now you were going back to talk --

5 MS. HINDE: I wasn't going to repeat anything.

6 THE COURT: No, you were -- I just didn't want
7 to leave that issue.

8 MS. HINDE: No, I didn't mean to interrupt.

9 THE COURT: So you were on Tortora.

10 MS. HINDE: I was only interrupting because I
11 was making --

12 THE COURT: It's okay.

13 MS. HINDE: -- (indiscernible) motions.

14 THE COURT: Go ahead.

15 MS. HINDE: The Tortora is the opportunity to
16 cure an absence, as Nichols said. I mean that was a case
17 your Honor knows it very well where you gave him lots of
18 opportunities when he's sitting down in the pens and
19 giving him his explanation of what would happen if he
20 didn't come back to the courthouse right then and there
21 and stand trial.

22 And Mr. Yannai did not get that opportunity,
23 although the government did not reach out --

24 THE COURT: He didn't get the opportunity
25 because he was unconscious.

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1 MS. HINDE: Well, but the government --

2 THE COURT: I mean, you know --

3 MS. HINDE: -- didn't object to a two day
4 continuance, your Honor.

5 THE COURT: Well even if I had given a two day
6 continuance, it wouldn't have made any difference because
7 he was not, as I understand the record, he was not
8 competent -- one of his doctors, I forget which one, it
9 may have been the treating physician or the consulting
10 psychiatrist, I believe said he wasn't able to really
11 engage him in conversation until the end of the third day
12 on June 3rd, which would have been the third day and he
13 wasn't released from the hospital or found to be capable
14 of being released from the hospital for another seven
15 days.

16 In the Nichols case, which really involved --
17 the defendant in that case who you're talking about is
18 Howard Pappy Mason, he was here in court and it was one
19 of the earliest cases that I had and my case manager
20 comes in and says to me, "The defendant doesn't want to
21 come out." I remember thinking to myself, what do I do
22 when a defendant doesn't want to come out?

23 And so we went into the holding pen -- I look
24 over there because in the courtroom that I had in the old
25 building it was to my left, with a court reporter and I

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1 said to him, "You know, this is the story. If you think
2 you could hold up this court, you're mistaken. I'm going
3 forward whether you are coming out or not." And I
4 explained to him why I thought it was in his best
5 interest to come out.

6 And I actually thought I persuaded him and I
7 still think the mistake I made was this; instead of
8 stepping back and letting him go first, I went first and
9 then he didn't follow me. But to complete the story, he
10 made various appearances. He would decide -- we arranged
11 to have a camera hooked up and he was -- he didn't refuse
12 to come to court. So, we arranged to have a camera and a
13 closed circuit television where if he wanted to watch, he
14 could watch and if he didn't want to watch, he didn't
15 watch and occasional he came up and if he wasn't pleased
16 by the testimony, he just stood up and walked out.

17 So it's a different kind of case. I had an
18 opportunity to say to him, hey listen, you think you're
19 going to hold up -- you're going to stop this case from
20 going forward, you're seriously mistaken.

21 But I didn't have that opportunity here and I
22 did weigh what I thought was a imposition on a -- you
23 know, I believe the jury should be treated, not only with
24 respect but with consideration for the disruption that a
25 trial imposes on their lives. I did not hold trial on

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1 the day that it occurred and I did take into account what
2 part of the proceeding I was in. This wasn't -- I would
3 not have done what I had done if this were in the middle
4 of trial and where we were still taking testimony.

5 And quite frankly in retrospect, I am sorry I
6 did what I did, not because I think I made any mistake
7 but because I don't like to create complicated legal
8 issues that could be avoided but eventually, it -- and
9 when it became clear that it was going to be another
10 week, I don't know that I would have held it, even though
11 I had held it for another day or two, whether I would
12 have held it for another seven days, disrupt
13 deliberations, increase a significant period of delay
14 between when the jury heard witnesses and the testimony
15 and, you know, have what essentially amounts to a ten day
16 delay. And I don't even remember whether the seventh day
17 would have fallen out on a weekend or not and whether it
18 would have even been more than a ten day delay.

19 But hey listen, that's what the Court of
20 Appeals gets paid to do. So I get paid to sentence and
21 that's what I think we have to do. So let me get these
22 papers out of the way.

23 (Pause)

24 THE COURT: All right. So I deny your motion
25 for a new trial, either in the interest -- certainly in

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1 the interest of justice and to the extent that it
2 involves a legal error that would be subject to reversal
3 on appeal which would be another ground for me to grant a
4 new trial, I deny it as well because I don't -- I believe
5 if I made an error, the error was harmless. I believe
6 that the defendant deliberately has the burden of proof
7 in this case that he has -- that in the light most
8 favorable to him, the evidence is in equipoise, that it's
9 not possible to know one way or another and that
10 therefore he loses because he has the burden of proof and
11 even if the government had the burden of proof, I would
12 still find that his absence was voluntary and deliberate.

13 So, let me get my papers out of the way that
14 deal with this issue.

15 Okay, so now we get to the sentencing part of
16 the proceeding. So where do we stand now that we have a
17 -- is there one issue that I have to resolve?

18 MR. SPECTOR: I believe it is the guidelines
19 dispute, your Honor --

20 THE COURT: I know.

21 MR. SPECTOR: -- with the cross-reference --

22 THE COURT: I know but that was the one issue I
23 was referring to. I was just wondering whether there was
24 more that you didn't --

25 MR. SPECTOR: I'm not aware of any other

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1 outstanding --

2 THE COURT: So the issue is the cross-
3 reference.

4 MS. HINDE: Your Honor, just as a subsidiary
5 issue to the cross-reference issue, because we received a
6 revision to the revised presentence report issued last
7 Wednesday. On Friday afternoon at about 4:30, indicating
8 that if the cross-reference applies, the government is
9 now proposing an additional four level increase based on
10 the same grounds that are cross-referenced would apply
11 under -- and we object to that also.

12 THE COURT: Well I think the argument
13 underlying that objection is well-taken. That there's a
14 degree of double-counting. I'm told though by my advisor
15 from probation that technically it's not double-counting,
16 even though it is and that -- but I intend to give a
17 sentence outside the guideline range. I intend to take
18 into account that there is, in fact, this double-counting
19 that you're talking about. There's something not right
20 with going up from a fourteen to whatever it is based on
21 the fact that there was force and then adding another
22 four points because there was force. I think that that
23 would be unfair and an unjustified form of double-
24 counting.

25 But I do find that there was force. I do find,

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1 I agree with the government's arguments in the memo that
2 it submitted, particularly with respect to I believe it's
3 N.Y. I don't think the initial general description that
4 she gave about what happened is inconsistent at all with
5 her testimony in court. Her testimony in court is
6 entirely consistent and I believe that with respect to
7 her for sure, that the government's view of this is
8 correct and that the adjustment on the cross-reference is
9 right.

10 I think it's -- I'm almost certain but it's
11 probable that it's equally true with respect to the --
12 what were the initials --

13 MR. SPECTOR: B.H.

14 THE COURT: -- B.H. So I do make that finding.

15 I looked at it carefully. In fact, I asked the
16 government to specifically address your arguments because
17 of the effect that it has on the guideline range. If I
18 am right on the -- and I believe Ms. Hinde is right and I
19 agree with her on the double counting, we're left -- we
20 would have -- if I didn't -- if there was no double-
21 counting -- where is my probation -- that the guideline
22 range would be 151 to 188.

23 MR. SPECTOR: That's a level 34, criminal
24 history 151 to 188.

25 MS. HINDE: Um-hum.

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1 THE COURT: And if you would like, I mean I
2 will have him put down in detail how he gets there but I
3 don't think there's any real dispute about it.

4 MR. SPECTOR: It's not necessary from the
5 government's perspective though.

6 THE COURT: Okay.

7 MS. HINDE: Are we to understand that that was
8 the --

9 THE COURT: I'm agreeing -- you win on that
10 point.

11 MS. HINDE: The revised -- yes, well the
12 revised presentence report contains and if that's the --
13 that's fine.

14 THE COURT: Right.

15 MS. HINDE: Well it's not fine but --

16 THE COURT: I know it's not fine but --

17 MR. CHECKMAN: Your Honor, there's one other
18 issue that I'm looking at the second revised presentence
19 report on page 31, there's a section in paragraph 168
20 relating to forfeiture.

21 THE COURT: I thought that that was going to be
22 for another proceeding, forfeiture.

23 MR. SPECTOR: That --

24 THE COURT: Am I --

25 MR. SPECTOR: That's correct. That's not part

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1 of the criminal procedure.

2 THE COURT: They were going to bring a separate
3 proceeding on the forfeiture.

4 MR. SPECTOR: We would have to bring a
5 separate --

6 THE COURT: I mean that's what I understood
7 from my reading a long time ago, I don't -- I assume that
8 it's -- my recollection is correct.

9 MR. CHECKMAN: Does that get removed from the
10 presentence report or from the second revised presentence
11 report, paragraph 168?

12 THE COURT: Let me read it to see how
13 prejudicial it is to you.

14 MR. CHECKMAN: I don't think it's particularly
15 prejudicial, your Honor. It just states that property
16 that does not belong to my client is forfeited.

17 THE COURT: It doesn't say -- it says that's a
18 potential penalty. This is under the section -- it's
19 after the sentence, after the supervised release, after
20 the restitution and it says forfeiture and then fines. I
21 mean, look, you want to take it out, we could take it
22 out? I don't -- I am not going to have him prepare a new
23 probation report over this.

24 MS. HINDE: There's been so many.

25 THE COURT: Yes. Okay? So I am ready to hear

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1 you.

2 Mr. Yannai, have you had an opportunity to read
3 the presentence report?

4 THE DEFENDANT: Yes.

5 THE COURT: Okay.

6 MR. CHECKMAN: Your Honor, if the Court
7 pleases, the Court is far more familiar with the facts
8 and circumstances from the very beginning of this case
9 than even counsel is, though I've had an opportunity to
10 read everything.

11 And from what I could see, your Honor, this
12 case started with an arrest and prosecution in
13 Westchester County by Ms. Stone and her office, whereby
14 at one point in time the Westchester County District
15 Attorney's office was seeking a sentence of probation.

16 We now are left with a presentence report, your
17 Honor, indicating a guideline level of 151 to 188 months.
18 What I suggest to the Court is this. That guideline
19 sentence makes little sense in this particular case, your
20 Honor. It way overstates the gravity of the crimes for
21 which Mr. Yannai was convicted and in many respects, your
22 Honor, it amounts to a life sentence for the conduct for
23 which he was convicted which was sexual abuse in the
24 third degree, a misdemeanor under New York State Law.

25 To me that makes no sense. It makes no sense

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1 on a variety of levels. Mr. Yannai has spent just shy of
2 three years incarcerated in this case at the Metropolitan
3 Detention Center, a maximum security prison. Over that
4 period of time, his health has deteriorated as are many
5 people who are housed in the Metropolitan Detention
6 Center but what we have here is an individual who is over
7 sixty-nine years of age, in poor health.

8 In my initial sentencing memorandum, your
9 Honor, I pointed out the -- and I am not even going to
10 bother to read them into the record now because they're
11 all over the record. He has chronic diseases. The
12 government has made a large deal out of the fact that
13 they don't believe he has cooperated in the tender care
14 and medical treatment from the MDC.

15 But notwithstanding that, your Honor, it is
16 clear that Mr. Yannai has several physical deficits which
17 will only get worse. The question now becomes what is
18 the appropriate sentence that recognizes both punishment
19 and protects the public? Well, the punishment level for
20 a sixty-nine year old who has now spent the last three
21 years in jail away from his wife, that's a severe
22 punishment.

23 But what we have here is a situation where Mr.
24 Yannai is being -- could be held in jail for the rest of
25 his life. As his condition worsens, he will require, he

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1 will require more and more treatment. He will require
2 correction officers to be able to take him to and from
3 medical facilities.

4 We will be spending thousands and tens of
5 thousands actually hundreds of thousands of dollars to
6 incarcerate him for the rest of his life, as the
7 government would have it and as the probation department
8 comes -- as the guidelines would have it. That makes no
9 sense.

10 This Court can protect the public and ensure
11 that Mr. Yannai is in no position to commit any crimes,
12 even similar to these crimes through a sentence that
13 involves home confinement, strict supervision by the
14 probation department. A sensible restrictions on his use
15 of the computer of his use of e-mail based upon
16 regulation through the probation service. All of this
17 can basically prevent this crime from ever happening
18 again.

19 So then the question is, do we warehouse Mr.
20 Yannai for the rest of his life in a federal prison at
21 incredible cost to the public for committing the crimes
22 of sexual abuse in the third degree, a misdemeanor under
23 New York State Law or do we decide at this particular
24 point in time that enough is enough, that we do not need
25 to put yet another person in jail for too long a period

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1 of time. And if sounds like I'm paraphrasing,
2 your Honor, I'm paraphrasing Eric Holder, Mr. Spector's
3 boss. Far too many people are spending far too much time
4 in our prisons at great expense with no public purpose
5 whatsoever. And I suggest to your Honor that putting Mr.
6 Yannai in jail for an additional period of time makes
7 little sense at all under the circumstances, your Honor.

8 I've asked in my sentence memorandum for this
9 Court to do what I believe is the proper thing; sentence
10 him to time served. Sentencing him to supervision under
11 the restrictions of this Court and the supervision of the
12 probation service in such a way that crimes such as the
13 ones he was convicted of can never ben committed again.

14 MR. SPECTOR: Judge, the defendant has left a
15 wake of victims who suffered immensely at the time and
16 who are still suffering today. You see that again and
17 again in the victim impact statements. This is not a
18 case where it's a one-time event, a one-time mistake.
19 This went on for years. It's really no exaggeration to
20 say in many ways this crime was the defendant's life's
21 work. And it would still be going on if the police
22 hadn't fortuitously intervened in 2009. It would still
23 be happening today.

24 You know there have been hundreds of pages
25 submitted to the Court since the trial, both by counsel

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1 and by the defendant acting pro se. In all of those
2 pages there's not one hint of sympathy for the victims
3 from the defendant. No acknowledgment whatsoever of any
4 wrongdoing. What we see from the defendant is a total
5 lack of remorse.

6 And, you know, I suppose that's not surprising
7 because of the record before the Court shows that the
8 defendant exhibits what I think can only be described as
9 a sociopathic level of selfish arrogance. We've seen
10 that in the way he treated his victims. We've seen that
11 in the way he approached the Court process. We saw that
12 most dramatically in the second overdose. He
13 purposefully ingests an overdose of benzodiazepine and
14 then gets in the car and drives for two hours on the
15 highway during rush hour. It's really maybe the most
16 fortunate thing about this case that he passed out when
17 he did.

18 THE COURT: Well we don't even know that that's
19 what happened. He could have conceivably taken the
20 pills, stopped at the gas -- stopped at the service
21 station and taken the pills then and there.

22 MR. SPECTOR: Well, Judge, we know he took an
23 overdose --

24 THE COURT: We know.

25 MR. SPECTOR: -- and he was in the car.

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1 THE COURT: I know. I'm just saying that this
2 is the one -- it's one possibility if he took it earlier,
3 then he was not only endangering his own life but he
4 could have killed a lot of people in the process.

5 MR. SPECTOR: Absolutely. And I think when you
6 look at the kind of mind set, and this has gone on for so
7 long where you have someone who has really a righteous
8 belief in his prerogative to do whatever he wants
9 regardless of the consequences to others; you have to
10 have a concern that this type of conduct, however it
11 manifests itself again will continue.

12 And, you know, just one episode that I think is
13 helpful in understanding the mind set of the defendant --
14 we talked about this during the bail litigation, after he
15 was charged in state court, after he had been publicly
16 charged with a crime, he went and approached that woman
17 who worked at the dry cleaner to try to get him to come
18 work at his home.

19 THE COURT: All right.

20 MR. SPECTOR: I'm sorry?

21 MS. JAGER: It was her -- you said him.

22 MR. SPECTOR: Oh, him. Yes. And so that again
23 shows you the mind set that we're dealing with. He's
24 undeterrable, regardless of the circumstances.

25 THE COURT: Well what about age and health?

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1 I'm not giving him time served. So we're talking about
2 -- I mean I regard that suggestion as ridiculous. But
3 when we're dealing with a question of age and health that
4 may be disabling as well in terms of the commission of
5 other crimes, depending on how long I sentence him to.

6 MR. SPECTOR: Well I think there are a couple
7 of points with respect to that. Number one, as we've
8 seen, much of the criminal activity actually did not
9 involve use of force. He was able to create an
10 atmosphere through psychological coercion, through
11 financial coercion, which he would still be able to do.
12 And even with Internet monitoring, unfortunately it's not
13 a perfect system, particularly with all sorts of iPhones
14 and handheld devices and who knows what will be available
15 in a few years. The problem is the mind set that he will
16 get around whatever restrictions are in place, physical
17 or legal, to do whatever he wants to do. This is never
18 going to go away.

19 And at the end of the day, Judge, really the
20 sentencing from our perspective is about the victims
21 because they all still live with the fear today and every
22 day in jail that the defendant spends is a day of
23 reprieve for the victims, that they don't have to fear
24 him.

25 THE COURT: Well, I am not -- I don't know why

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1 these victims would continue to fear him. You said
2 yourself in most of these cases, force was not used. He
3 had a little trouble getting these women to come to his
4 -- to fall for his, you know, scheme. I don't know why
5 they would continue to live in fear. I could understand
6 the argument that they might take some comfort from the
7 fact that the person who perpetrated these acts has been
8 punished. And that punishment is certainly factor to be
9 taken into account at sentencing but I don't quite
10 understand why they would still be in fear of him.

11 MR. SPECTOR: Judge, if you recall the
12 testimony, the defendant exerted a total control over
13 their lives.

14 THE COURT: But that was because -- look,
15 you're putting me in almost the position of trying to
16 defend him; he was able to exercise total control over
17 their lives because of the circumstances because he
18 essentially under false pretenses, he lures them into
19 this -- his house in Pound Ridge, a relatively rural
20 area. They have no money. They're in a strange country.
21 He makes them offer essentially that they can't refuse.
22 They could live in his house and pick up all their
23 expenses and at the end of the year, he'll give them
24 \$20,000 or they could live outside the house and they
25 could pick up their own expenses.

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1 So this whole arrangement -- and then they find
2 themselves because they take the offer of living in his
3 house and they found themselves in what I would say for
4 lack of a better word is almost psychologically enslaved
5 by the circumstances. So I mean this is not likely to
6 repeat itself with respect to those women.

7 MS. STONE: Your Honor, if I may? I think
8 what's important to remember is the ongoing nature of the
9 trauma that these victims continue to suffer because of
10 that psychological abuse. This defendant knew
11 everything about these women and these victims that he
12 targeted. He knows where they live. He knew where they
13 worked. He knew their family members. And that is part
14 of the psychological control that he exerted over them.
15 And they've described, I think quite eloquently --

16 THE COURT: Oh, I don't -- again, I think what
17 he did was awful and I don't think it has to be
18 exaggerated but in the end, however long it may have
19 taken them, a week, two weeks, three weeks, they decided
20 to leave. So -- and even drove -- you know, the trial is
21 already three years ago or two and a half years ago, he
22 drove some of them to the station. So we're not dealing
23 with they were in extremely difficult circumstances. I
24 think they were again, as I say psychologically enslaved.
25 It took a while for them to get up the energy and the

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1 strength to say I am not going to do this anymore.

2 But I think the notion that they're still
3 afraid of him is a little bit more than what I could
4 accept.

5 MR. SPECTOR: I understand, Judge. I think the
6 point is from the perspective of the victims --

7 THE COURT: I think from the perspective of the
8 victims and I think it's an important perspective, is
9 that they should feel that a just punishment was imposed.
10 And that in that sense, one of the critical elements that
11 should be taken into account is that it should go into a
12 reasonable sentences punishment.

13 MR. SPECTOR: And from our perspective, that
14 reasonable sentence is the guideline range of
15 (indiscernible).

16 THE COURT: Okay. Do you have anything to add?

17 MR. CHECKMAN: Just a little -- very, very
18 briefly, your Honor. Since the Court has indicated that
19 a time served sentence is not something that the Court
20 will impose even though I wasn't being facetious when I
21 made the application, your Honor, and --

22 THE COURT: I don't think you were being
23 facetious. You were being a lawyer. You were making the
24 best arguments. Look, it's not -- there are articles
25 that suggest that -- you know, with some of these

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1 Draconian sentences that are imposed, particularly in
2 drug cases, you know, federal prison is going to become
3 geriatric homes and the government being burdened with
4 dealing with sick old people. So you know --

5 MR. CHECKMAN: No.

6 THE COURT: -- I understand the point but
7 that's not -- you know, it doesn't drive -- it has some,
8 I suspect -- some merit to be taken into account but I
9 don't think it's -- I'm not overwhelmed, at least in the
10 context of this case.

11 You know he wasn't -- it wasn't as if he was
12 young, and vigorous and healthy when he committed these
13 crimes.

14 MR. CHECKMAN: But he's much -- he's less
15 young, less healthy --

16 THE COURT: It's three years --

17 MR. CHECKMAN: -- less vigorous.

18 THE COURT: He's three years older. He is
19 suffering essentially from what I could tell, most of the
20 same illnesses; chronic -- I don't want to go through it
21 but he's being medicated. He's taking statins for his
22 coronary condition and pills or diabetes.

23 Look, all of these -- I don't doubt that all of
24 these are eventually degenerative conditions and they'll
25 ultimately result in his death.

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1 MR. CHECKMAN: What I am asking the Court to do
2 at this point is to in rendering the sentence, first of
3 all, I am going to ask the Court to recommend that Mr.
4 Yannai be incarcerated in Otisville. The reason I am
5 asking for that is because it's about the closest prison
6 for him to be visited by his wife who has visited him
7 from my knowledge, your Honor, every single Wednesday
8 since he has been incarcerated and not missed a day.
9 It's important to him. It's important to her. And I
10 think it is not an unreasonable request.

11 And finally, your Honor, I would just ask the
12 Court to listen to the strictures of the sentencing
13 statute. The phrase that says that the sentence to be
14 imposed should be sufficient to meet the requirements and
15 the aims of the sentencing statute but not greater than
16 necessary.

17 THE COURT: Well, that's a great generality
18 that's never given me any comfort or guidance.

19 MR. SPECTOR: Judge, excuse me.

20 MR. CHECKMAN: I gave you a specific, Judge.

21 MR. SPECTOR: I just think you need to ensure
22 that the defendant has a right to speak to the Court.

23 THE COURT: I haven't forgotten. Do you wish to
24 speak, Mr. Yannai? You could come up if you want or you
25 could stay where you're seated.

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1 THE DEFENDANT: I don't wish to speak.

2 THE COURT: Okay. I'm just going to take a
3 five minute recess.

4 MR. CHECKMAN: Your Honor, one thing I would
5 like to tell the Court is that I have advised Mr. Yannai,
6 though we are mindful of the fact that he has the right
7 to speak before this Court and based upon the fact that
8 he has an upcoming appeal in this particular case, and I
9 have advised him that he should not speak at this point,
10 your Honor.

11 THE COURT: I really don't quite understand
12 that. I don't see how it prejudices his appeal. His
13 appeal, I don't believe is going to be of the sufficiency
14 of the evidence. It's going to be on the grounds that,
15 you know, were very well argued as always, in the papers
16 that Ms. Hinde has filed. And I don't see how any of
17 those grounds that have nothing to do with guilt or
18 innocence, the sufficiency of the evidence --

19 MR. CHECKMAN: I understand what the Court's
20 point is.

21 THE COURT: -- have --

22 MR. CHECKMAN: But I have had discussions with
23 my client, your Honor, over various aspects of an appeal
24 that will be filed and it was my judgment, your Honor,
25 that he can't -- that at this point in time, he could not

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1 add to the proceedings.

2 THE COURT: I suppose depending on what he
3 would say you might be right. Okay.

4 (Off the record)

5 THE COURT: I'm going to sentence the defendant
6 to the custody of the attorney general for 132 months.
7 I'm going to impose concurrent -- to run concurrently on
8 each count. On Count Four and Six, I sentence the
9 defendant to the custody of the attorney general for a
10 period of five years, concurrent on each count and
11 concurrent on all the other counts. On Count Five, I
12 sentence the defendant to the custody of the attorney
13 general for a period of ten years, concurrent to all the
14 other counts. On Count Six, I sentence the defendant to
15 six months sentence concurrent to all the other
16 sentences. And I impose a period of three years
17 supervised release with a special condition that the
18 defendant be subject to computer monitoring as directed
19 by the probation department. That defendant not have any
20 contact with the victims. This means that he shall not
21 have or attempt to meet in person, communicate by letter,
22 telephone, e-mail, the Internet, or through a third-party
23 without the knowledge and permission of the probation
24 department. The defendant shall submit his personal
25 residence, place of business, vehicle or any other

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1 premises under his control to a search on the basis that
2 the probation department has a reasonable belief that
3 contraband or evidence or a violation of conditions of
4 release may be found. The search must also be conducted
5 in a reasonable manner and at a reasonable time and the
6 failure to submit such a search may be grounds for
7 revocation and the defendant shall inform any other
8 resident that the premises may be subject to search
9 pursuant to the condition.

10 The defendant shall not possess a firearm,
11 ammunition or destructive device and the defendant shall
12 comply with sex offender registration requirements that
13 are mandated by law. And I impose a \$610 special
14 assessment.

15 I have imposed a sentence under Section
16 3553(a). I believe that the defendant -- for the
17 offenses that the defendant committed were just, as I've
18 indicated, were just terrible not only in terms of the
19 impact that -- not only in terms of the sexual contact
20 and abuse of the victims but also because of the
21 circumstances under which they occurred.

22 They were falsely lured into a situation under
23 which they were essentially, under psychological
24 compulsion. They were psychological prisoners and alone
25 in a strange country with little money and no friends and

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1 being subject to the conduct of the defendant that we've
2 already discussed and gone through. I've taken into
3 account, of course, the sentencing guidelines which are
4 higher than the sentence that I've imposed. The only
5 mitigating factor here and I believe that the sentence
6 that I've imposed is under the circumstances sufficient
7 to carry out what I think is the most important part of
8 the sentence in this case; that is punishment.

9 To the extent that I have not -- that I have
10 given the sentence less than what the guidelines would
11 other require, the only mitigating circumstance here is
12 his health and his age. And in my view, they justify
13 some adjustment of the sentence.

14 (Pause)

15 THE COURT: Paula said that I misspoke in some
16 of the count numbers. So, just to make sure that it's
17 correct: on Count One through Three, fifteen years to the
18 custody of the attorney general to run -- not fifteen
19 years, I'm sorry -- 132 months, to run concurrently with
20 each other.

21 On Counts Four and Six, five years in the
22 custody of the attorney general to run concurrent with
23 each other and all the other counts. On Count Five, ten
24 years in the custody of the attorney general, concurrent
25 with all other counts. And Count Seven, six month

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1 custody of the attorney general to run concurrent with
2 all the other counts and the period of supervised release
3 is three years.

4 THE CLERK: Thank you, Judge.

5 MR. CHECKMAN: Your Honor?

6 THE CLERK: One moment. Disposition of any
7 remaining counts or underlying indictments?

8 THE COURT: There are none.

9 MR. SPECTOR: I think there was an underlying
10 indictment which will be dismissed.

11 THE COURT: It's dismissed.

12 MR. CHECKMAN: Can I ask the Court to recommend
13 that -- to the Bureau of Prisons that Mr. Yannai be
14 incarcerated in Otisville?

15 THE COURT: You can and I will but you should
16 be aware that in terms of his physical condition, he
17 might not get the most optimum -- that Otisville may not
18 be the most optimum place for him to be. That he would
19 be better off in a facility that provides medical care.
20 I seen one of them -- I'm not suggesting that's the one
21 but for example, I visited the federal facility in Fort
22 Worth, Texas which is a combination. It's sort of a
23 prison hospital and a prison. Not everybody is sick but
24 they have the ability to take care of people who have
25 physical conditions.

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1 So I'll recommend Otisville if that's what he
2 wants but it's a place that's not necessarily --

3 MR. CHECKMAN: Well that is what he wants, your
4 Honor, and the idea is so that he can get -- to increase
5 the opportunity for visitation of his wife which is very
6 important to him.

7 THE COURT: I'll recommend it.

8 MR. CHECKMAN: Your Honor, I have one other
9 issue, I believe before the Court. In my letter of
10 September 16th, I asked the Court to direct the
11 government to return the -- to do whatever the government
12 has to do to release the funds that I believe are being
13 held by the clerk of the court as security for his bail;
14 \$67,000.

15 The government has resisted this, saying that
16 they can hold onto the money. It's the defendant's money
17 for payment of a variety of other things including
18 restitution, and the \$610 special assessment. But having
19 reviewed the government's submission and the presentence
20 report, the grand total if we add the \$610,000 (sic) --

21 THE COURT: \$610.

22 MR. CHECKMAN: -- to the \$6,762.25 --

23 THE COURT: \$610.

24 MR. CHECKMAN: -- there's like \$7,372, seems to
25 me that you cannot -- even if the money was his, you

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1 shouldn't be able to hold \$67,000. Putting that aside,
2 your Honor, the money wasn't his. In fact, I don't think
3 that they would have secured his release if he was
4 putting up his own money. I think that the Court had its
5 concerns about whether Mr. Yannai would show up in court.
6 I think that there was a tremendous amount of bail
7 litigation in this case and that they wanted some further
8 assurance that the defendant would show up in the
9 courtroom when he was supposed to and therefore, his wife
10 would come up with her money and he would be less likely
11 to disappoint her by taking her \$67,000. I mean, that's
12 the normal course of affairs.

13 As the cases are -- the case I've cited to the
14 Court, United States v. Powell, 639 F.2d. 224 at page 225
15 said "The purpose of bail is to secure the presence of
16 the defendant. Its object is not to enrich the
17 government or punish the defendant. Like any other
18 contract, a bail bond should be construed to give effect
19 to the reasonable intentions of the parties with the
20 understanding that the construction should be in favor of
21 the surety who may not be held liable for greater
22 undertaking than agreed to."

23 And I believe that Elena Fussilo deposited her
24 \$67,000 to secure her husband's release. That was the
25 intentions of the parties at the time and she should not

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1 at this point in time forfeit her money and her interest
2 in her money.

3 As for the government's contention that this
4 marital property, your Honor, this is not as I've pointed
5 out in my letter, a community property state. Therefore,
6 any decision as to whose money is whom would be at the
7 dissolution of marriage at the time where the parties
8 would settle and a court of jurisdiction would then
9 determine this is yours and this is yours.

10 So right now, there's no reason to believe that
11 the money belongs to anyone else other than Elena Fusillo
12 because for well over four years the defendant hasn't
13 worked and hasn't earned a dime as the government pointed
14 out time and time again.

15 So this was her money that she put up to secure
16 her husband. It doesn't belong to him. She earned it
17 from her job and it should be returned to her.

18 MR. SPECTOR: Judge, first of all, I don't know
19 how he can possibly say it's solely her money. They've
20 been married for 23 years. As I understand the marital
21 law, the only way it would be her money separate from the
22 marital property is if she had earned it before the
23 marriage, which I don't think is the contention.

24 THE COURT: I'm not -- you know, first of all
25 you may be confusing divorce law from other kinds of law

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1 and also community property which is different in a
2 state, for example, like California but I think what
3 you're getting at is how the assets of the two of them
4 might be divided in the event of a divorce which is what
5 I am not dealing with here and short of that, it's her
6 money.

7 MR. SPECTOR: Well if I can speak to that, we
8 have no evidence of that. We have an assertion by the
9 defense which presumably is coming from either the
10 defendant or his wife, that it came from an account in
11 her name. We've seen nothing. The cash was just posted
12 at the time of the bail.

13 THE COURT: By whom?

14 MR. SPECTOR: By her. But it could easily have
15 been from an account in his name. We don't know where
16 the money came from. So at a minimum, if the ruling is
17 that you know, if the account was in her name, it's her
18 money. We would like to see a paper trail showing that
19 that's what happened.

20 THE COURT: Well, she put up the money and she
21 wants it back.

22 MR. SPECTOR: But, Judge, respectfully it could
23 have been a joint account.

24 THE COURT: Could I ask you --

25 MR. CHECKMAN: It wasn't a joint account. So

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1 if you don't believe it's a joint account based upon my
2 say so and based upon her say so, then prove it's not a
3 joint account. You've got subpoena power.

4 THE COURT: Who -- he is saying it is a joint
5 account.

6 MR. CHECKMAN: It's not a joint account. The
7 money came from her personal account. She's the only
8 signatory on the account.

9 THE COURT: He says, show him the book -- show
10 him the bank book. If you have any objection, we don't
11 have to -- there's no such thing anymore but you know
12 what I mean and we don't have to argue about. Other than
13 that, you can write a memo on who has the burden of proof
14 over that \$7,000.

15 MR. SPECTOR: Judge, there's a separate matter
16 and that is the imposition of restitution which I believe
17 should be imposed regardless of whether this money goes
18 to him.

19 THE COURT: It's a small -- a relatively small
20 amount. I don't remember. It's not -- the amount is in
21 the paragraph in the presentence report and I don't think
22 it --

23 MR. SPECTOR: It's paragraph 167.

24 THE COURT: -- I don't think it's --

25 MR. CHECKMAN: \$6,762.25 of restitution,

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1 your Honor.

2 THE COURT: But the question is his ability to
3 pay restitution in terms of my making -- you know,
4 getting into an argument over whose money is what. How
5 much did you say it is?

6 MR. SPECTOR: It's \$6,762.25.

7 THE COURT: Look, he says he has no money. I
8 assume --

9 MR. CHECKMAN: He has no money, your Honor.
10 Sometimes he -- they have -- the Bureau of Prisons
11 imposes upon defendants some financial responsibility and
12 therefore, if he was working, they would deduct a certain
13 amount of that money to be put away towards it. They do
14 it with a special assessment all the time as well,
15 your Honor.

16 THE COURT: Well, if I operate under the
17 assumption he has no money now, then I may have to impose
18 this but I have to do it under a reasonable payment
19 schedule. What I normally do is in these cases where
20 restitution has to be imposed and the defendant has no
21 assets is I say in the amount of, you know, fifteen
22 percent of their net income after they're released, since
23 he has no income while he's in jail.

24 THE COURT: All right. And from what I
25 understand, there's lawsuits pending against him which

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1 are waiting to be collected, if he has any to be
2 collected.

3 So I will impose restitution in the amount of
4 \$762.25 (sic).

5 MR. SPECTOR: Judge, excuse me. I think you've
6 misspoken. Is it \$6,762.25?

7 THE COURT: That's what I thought I said.

8 THE CLERK: No.

9 THE COURT: I didn't?

10 THE CLERK: No, you forgot the \$6,000 portion.

11 THE COURT: I can't be trusted with numbers.
12 \$6,762.25 to be paid at ten percent of his net income
13 after he's released.

14 MR. SPECTOR: Judge, there are specific amounts
15 we've worked out for each victim. I can prepare a form
16 order for the Court.

17 THE COURT: Okay. I assume you're filing a
18 notice of appeal. You have a right to appeal.

19 Do you understand that?

20 THE DEFENDANT: (Indiscernible)

21 THE CLERK: Thank you, counsel.

22 MR. CHECKMAN: Thank you.

23 MR. SPECTOR: Thank you.

24 (Matter concluded)

25 -o0o-

C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 27th day of October, 2013.


Linda Ferrara

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